

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

# STEWART TITLE GUARANTY COMPANY,

**Plaintiff,**

V.

2485 CALLE DEL ORO, LLC,  
*et al.*,

## Defendants.

Case No. 15-cv-2288-BAS(WVG)

**ORDER ADOPTING IN PART  
AND DECLINING TO ADOPT IN  
PART MAGISTRATE JUDGE'S  
REPORT AND  
RECOMMENDATION ON  
PLAINTIFF'S MOTION FOR  
SANCTIONS**

[ECF Nos. 45, 54]

Presently before the Court is Magistrate Judge William Gallo's Report and Recommendation ("R&R") (ECF No. 54) regarding Plaintiff Stewart Title Guaranty Company's Motion to Impose Sanctions Pursuant to FRCP 37(b) ("Motion for Sanctions") (ECF No. 45).

On May 2, 2017, Plaintiff filed its Motion for Sanctions against Defendants Courtland Gettel and Conix VRC, LLC (“Defendants”) and their counsel, Joseph Sammartino, for failure to comply with a court order compelling discovery. (ECF No. 45.) Plaintiff sought sanctions including the striking of Defendants’ answers to the Complaint, entry of default judgments against these Defendants, and the

1 imposition of monetary sanctions on Defendants and Mr. Sammartino in connection  
2 with Plaintiff's expenses incurred in connection with the motion for sanctions and a  
3 prior motion to compel. (*Id.*) Defendants Court Gettel and Conix VRC, LLC and  
4 Mr. Sammartino did not file an opposition to the motion for sanctions. Judge Gallo  
5 held a hearing on the motion for sanctions on July 14, 2017, which only Plaintiff's  
6 counsel attended. On August 7, 2017, Judge Gallo issued the R&R on Plaintiff's  
7 Motion for Sanctions. (ECF No. 54.) The time for filing objections to the R&R  
8 expired on August 22, 2017. (*Id.* at 35:1–3.) On August 29, 2017, Plaintiff filed a  
9 notice of non-receipt of objection to the R&R. (ECF No. 55.) Defendants Court  
10 Gettel and Conix VRC, LLC and Mr. Sammartino made no objection to the R&R.  
11 This Court subsequently held a hearing on an order to show cause why the R&R  
12 should not be adopted in its entirety. (ECF Nos. 56, 58.)

13 For the reasons set forth below, the Court adopts in part and declines to adopt  
14 in part the R&R.

## 15 **I. BACKGROUND**

16 The Court hereby incorporates the fact section of the R&R (ECF No. 54) in its  
17 entirety, which Judge Gallo certified pursuant to 28 U.S.C. §636(e)(6).

18 In particular, the Court notes the following facts:

- 19 (1) Although Mr. Sammartino repeatedly promised the Court and the  
20 Plaintiff that discovery was forthcoming, that discovery has still not  
21 been produced two years into this case;
- 22 (2) After months of promises to provide requested discovery, Plaintiff's  
23 counsel's voicemails and email inquiries to Mr. Sammartino beginning  
24 in 2017, remained unanswered. Specifically, Plaintiff's counsel reached  
25 out to Mr. Sammartino twice in January 2017 and multiple times in  
26 February 2017 without any response;
- 27 (3) At a status conference set before Magistrate Judge Skomal on February  
28 24, 2017, Mr. Sammartino explained that he had been out of the country

1 and did not have access to his email;

2 (4) Mr. Sammartino again failed to respond to Plaintiff's counsel's inquiries  
3 by telephone and email on multiple occasions in March 2017, and no  
4 discovery was forthcoming;

5 (5) Judge Skomal set a conference for March 24, 2017 to learn why the  
6 discovery had still not been produced. Instead of informing the Court  
7 he was unavailable or requesting rescheduling of the conference, Mr.  
8 Sammartino instead failed to appear, emailing Plaintiff's counsel that he  
9 should inform the Court of Mr. Sammartino's unavailability. The status  
10 conference went on without Mr. Sammartino.

11 (6) After the transfer of the case, Judge Gallo ordered further briefing on  
12 Plaintiff's Motion for Sanctions and ordered Defendants and Mr.  
13 Sammartino to appear for a hearing on July 14, 2017. Both orders were  
14 ignored – no briefing was filed and neither Defendants, nor Mr.  
15 Sammartino appeared as ordered; and

16 (7) Defendants and Mr. Sammartino ignored the formal discovery deadlines  
17 and failed to respond to Requests for Production of Documents and  
18 Interrogatories served on January 25, 2017. These Requests and  
19 Interrogatories remain unanswered ten months later.

20 Since the R&R was filed, Defendants and Mr. Sammartino continued to ignore  
21 the Court. The R&R recommended that several sanctions be issued, including:  
22 striking Defendants' Answers to the Complaint and entering judgment in favor of the  
23 Plaintiff, imposing monetary sanctions against both Defendants and Mr. Sammartino  
24 jointly and severally, reporting Mr. Sammartino to the State Bar of California, and  
25 imposing criminal contempt sanctions against Mr. Sammartino. Despite the fact that  
26 the R&R recommended these sanctions, Mr. Sammartino failed to file any objections  
27 explaining his conduct or asking that the R&R not be adopted in its entirety.

28 After the time for filing objections to the R&R expired, this Court ordered the

1 parties to show cause why the R&R should not be adopted in its entirety. (ECF No.  
2 56.) The Court reached out to both Plaintiff's counsel and Mr. Sammartino to set a  
3 hearing date on the order. (*Id.*) Although Plaintiff's counsel responded to the Court,  
4 Mr. Sammartino did not. The Court left two voicemails with Mr. Sammartino's  
5 phone number of record to no avail. (*Id.*)

6 On October 30, 2017, the Court held the hearing on its order to show cause at  
7 which Plaintiff's counsel appeared telephonically and Mr. Sammartino appeared in  
8 person. (ECF No. 58.) At the hearing, Mr. Sammartino agreed that terminating  
9 sanctions and attorney fees against his clients are appropriate. Mr. Sammartino  
10 initially represented to the Court that "I was never ordered to the best of my  
11 knowledge to appear at anything that I didn't appear at." After the Court referenced  
12 the R&R's recommendation that Mr. Sammartino be jointly and severally liable with  
13 his client for failure to show up at several hearings, Mr. Sammartino conceded that  
14 "I'm aware of one hearing that I missed. I'm not aware of multiple ones." With  
15 respect to his failure to provide discovery responses to Plaintiff's counsel, Mr.  
16 Sammartino stated that his clients "stonewalled" him and he was told there was  
17 information when none existed. Mr. Sammartino disputed that he had been  
18 uncommunicative with Plaintiff's counsel other than "missing one hearing possibly."  
19 Instead, Mr. Sammartino represented that he had received no emails, letters, or phone  
20 calls from Plaintiff's counsel that have gone unanswered. Although the R&R  
21 informed the parties that a failure to file timely objections might waive the right to  
22 raise those objections on appeal, Mr. Sammartino represented that "I didn't realize  
23 that a written response was required." After the Court referenced the R&R's  
24 requirements, Mr. Sammartino conceded his responsibility for failure to file any  
25 written objections.

26 Notably, Mr. Sammartino provided no reason for his failure to attend two court  
27 hearings before the Magistrate Judges, initially denying knowledge of any hearing he  
28 missed, and later conceding he may have missed one. Nor did Mr. Sammartino

1 explain why sanctions, as recommended by Judge Gallo, would not be appropriate.  
2 He denied being incommunicative with Plaintiff's counsel, a denial that is clearly  
3 belied by the record. And he failed to explain why he never filed any objections to  
4 Judge Gallo's R&R.

5 Based on the foregoing facts, the Court now considers adoption of the R&R.

6 **II. DISCUSSION**

7 **A. Legal Standard**

8 The Court reviews *de novo* those portions of an R&R to which objections are  
9 made. 28 U.S.C. § 636(b)(1). The Court may "accept, reject, or modify, in whole or  
10 in part, the findings or recommendations made by the magistrate judge." *Id.* "The  
11 statute makes it clear," however, "that the district judge must review the magistrate  
12 judge's findings and recommendations *de novo if objection is made*, but not  
13 otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en  
14 banc) (emphasis in original); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219,  
15 1226 (D. Ariz. 2003) (concluding that where no objections were filed, the district  
16 court had no obligation to review the magistrate judge's report). "Neither the  
17 Constitution nor the statute requires a district judge to review, *de novo*, findings and  
18 recommendations that the parties themselves accept as correct." *Reyna-Tapia*, 328  
19 F.3d at 1121. This legal rule is well-established in the Ninth Circuit and this district.  
20 *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005) ("Of course, *de novo*  
21 review of a[n] R & R is only required when an objection is made to the R & R.");  
22 *Nelson v. Giurbino*, 395 F. Supp. 2d 946, 949 (S.D. Cal. 2005) (Lorenz, J.) (adopting  
23 report in its entirety without review because neither party filed objections to the  
24 report despite the opportunity to do so); *see also Nichols v. Logan*, 355 F. Supp. 2d  
25 1155, 1157 (S.D. Cal. 2004) (Benitez, J.).

26 **B. Analysis**

27 Neither party has objected to the R&R's finding or recommendations.  
28 Consequently, the Court may adopt the R&R on that basis alone. *See Reyna-Tapia*,

1 328 F.3d at 1121. Nonetheless, the Court has conducted a *de novo* review of  
2 Plaintiff's Motion for Sanctions and the R&R. (ECF Nos. 45, 54.)

3 First, based on the Court's *de novo* review as well as on the hearing on the  
4 order to show cause, the Court finds that Judge Gallo correctly concluded that  
5 Defendants Court Gettel and Conix VRC, LLC's "sustained misconduct, failures,  
6 and violations amounting to willfulness and bad faith," requires the imposition of  
7 terminating sanctions, striking of Defendants' Answers, and the entry of default  
8 judgment pursuant to Fed. R. Civ. P. 37(b)(2)(vi.). (ECF No. 54 at 22.) Defendants  
9 failed to provide requested discovery to Plaintiff over the duration of this case, and  
10 two years after the case was filed, discovery still has not been provided. Although  
11 the full extent of Defendants Gettel and Conix VRC, LLC's knowledge of the  
12 discovery issues in this case is not clear, these Defendants were served with a  
13 summons and, at a minimum, were well aware that they were being sued. Mr.  
14 Sammartino's representations to the Court confirm that his clients likely had at least  
15 some knowledge of Plaintiff's discovery requests. Taking Mr. Sammartino's word  
16 that his client "stonewalled" him or misled him, such conduct would amount to the  
17 willfulness or bad faith required to impose a default sanction for a party's failure to  
18 obey a prior court order compelling discovery. *See Hester v. Vision Airlines, Inc.*,  
19 687 F.3d 1162, 1169 (9th Cir. 2012). The Court finds especially compelling Mr.  
20 Sammartino's concession at the hearing that terminating sanctions against his clients  
21 are appropriate. Moreover, as Judge Gallo observed, case dispositive sanctions  
22 against a party are appropriate even if the violative conduct is solely the party's  
23 attorney's fault. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962). This is  
24 because a party voluntarily chooses the attorney as its representative in a case. *Id.* at  
25 633. Here, Defendants' counsel failed to fulfill multiple promises to Plaintiff's  
26 counsel and to the Court to provide requested discovery and failed to comply with a  
27 court order compelling production. This conduct would provide an independent basis  
28 for imposing a default sanction. Both the conduct of Defendants and Mr. Sammartino

resulted in substantial prejudice to the Plaintiff and its ability to move this case forward.

Rather than entering default judgment at this time, however, the Court will direct the Clerk of the Court to enter default against Defendants Gettel and Conix VRC, LLC, particularly because (1) this case involves multiple defendants<sup>1</sup>, one of whom, Defendant Kathryn Nighswander<sup>2</sup>, is not in default, and (2) the Court lacks sufficient information regarding the damages to which Plaintiff may be entitled as part of a default judgment.

Second, the Court also finds that Judge Gallo correctly concluded that Defendants and Mr. Sammartino should be jointly and severally liable to Plaintiff for \$6,275 in total expenses incurred in its discovery motions. (ECF No. 54 at 22–28.) Because Plaintiff sought and was granted a court order by the former Magistrate Judge ordering Defendants to respond to discovery requests (ECF No. 44), Plaintiff is entitled to fees and costs under Federal Rule of Civil Procedure 37(a)(5)(A). Judge Gallo correctly concluded that Plaintiff is entitled to payment of \$4,050 in fees

<sup>1</sup> The previous judge on this case, Judge Roger Benitez, denied Plaintiff's motion for default judgment against Defendants 2485 Calle del Oro, LLC, Jeffrey H. Greenberg, and Lynette Moreno, who had default entered against them. (ECF No. 25.) Judge Benitez determined that entering judgment to those defaulting defendants "would not be proper" because "Defendants are similarly situated and the claims against them rest on the same legal theories." (*Id.* at 3.) Under such circumstances, a court should typically wait until resolution of claims against non-defaulting defendants before entering a default judgment. *Garamendi v. Henin*, 683 F.3d 1069, 1082-83 (9th Cir. 2012). Judge Benitez instructed that Plaintiff could file an amended motion for default judgment within 30 days of the resolution of the claims against the non-defaulting Defendants. (ECF No. 25 at 3.)

<sup>2</sup> Plaintiff's initial motion to compel and for sanctions expressly did not include Defendant Nighswander, but rather indicated that proceedings against her are currently stayed because of her pending bankruptcy. (ECF No. 42-1 at 2 n.1.) Accordingly, Plaintiff did not move to compel discovery responses from her (*id.*) and she was not subject to the discovery order Defendants Gettel and Conix VRC, LLC violated (ECF No. 44 at 1 n.1).

1 incurred in meet and confer efforts with Mr. Sammartino, preparation of its motion  
2 to compel, and related tasks. Plaintiff is also entitled to \$2,225 in expenses  
3 necessitated by the motion for sanctions (ECF No. 45) pursuant to Rule 37(b)(2)(C).  
4 This Rule mandates an award of expenses directly related to or caused by a party's  
5 failure to obey a discovery order. *Id.*; *Goodyear Tire & Rubber Co. v. Haeger*, 137  
6 S. Ct. 1178, 1183–84 (2017). Both Rule 37(a)(5)(A) and Rule 37(b)(2)(C) permit a  
7 court to require a party's attorney to also pay expenses resulting from discovery  
8 misconduct. The record regarding Mr. Sammartino's conduct in this case is clear.  
9 (See ECF No. 54.) In relevant part, Judge Gallo ordered Mr. Sammartino to  
10 personally appear at a hearing concerning Plaintiff's Motion for Sanctions (ECF No.  
11 47), but he failed to do so. This was the second time Mr. Sammartino failed to appear  
12 in this case. He earlier failed to appear at a telephonic status conference, without  
13 informing the Court, and instead relied on Plaintiff's counsel to let the Court know  
14 that he would not be able to appear.

15 At this Court's hearing on the order to show cause, Mr. Sammartino initially  
16 disavowed knowledge of court orders requiring him to appear in court related to the  
17 discovery dispute and disavowed knowledge of the R&R's requirement to file written  
18 objections. This representation cannot be squared with the fact that Judge Gallo's  
19 order and the R&R were entered on the electronic docket in this case, for which Mr.  
20 Sammartino has registered his email address – an address identical to Mr.  
21 Sammartino's email address on file with the State Bar of California. (ECF No. 54 at  
22 32 n.19.) There is no doubt that Mr. Sammartino received the order, the R&R, and  
23 any other docket entries relevant to the discovery dispute. The Court finds that Judge  
24 Gallo correctly concluded that Mr. Sammartino's conduct warrants making him  
25 jointly and severally liable with his clients for payment of Plaintiff's expenses.

26 Third, the Court finds that Judge Gallo also correctly concluded that Mr.  
27 Sammartino is required to report to the California State Bar. California Business and  
28 Professions Code §6068(o)(3) requires California-licensed attorneys to self-report

1 imposition of judicial sanctions of \$1,000 or more. Because this Court agrees that  
2 Mr. Sammartino is jointly and severally liable with his client for payment of expenses  
3 exceeding this amount as a discovery sanction, Mr. Sammartino is required to report.  
4 Because the statute requires the attorney to self-report, the Court declines in its  
5 discretion to follow the recommendation that a copy of this order be forwarded to the  
6 State Bar of California and, instead, will order Mr. Sammartino to self-report the  
7 judicial monetary sanction.

8 Lastly, the Court declines in its discretion to impose criminal contempt  
9 sanctions against Mr. Sammartino. *See Britt v. Simi Valley Unified School Dist.*, 708  
10 F.2d 452, 454 (9th Cir. 1983) (district court has the power to “accept, reject, or  
11 modify, in whole or in part, the findings or recommendations made by the magistrate”  
12 whether objections have been filed or not).

13 **III. CONCLUSION & ORDER**

14 The Court **HEREBY ORDERS** that:

- 15 1. The Court **ADOPTS IN PART AND DECLINES TO ADOPT IN**  
16 **PART THE R&R (ECF No. 54)**. The Court adopts the R&R as to all  
17 aspects except as to (a) the imposition of criminal contempt proceedings  
18 against Mr. Sammartino and (b) any reporting under Cal. Bus. Prof.  
19 Code §6068(o)(3) that is not self-reporting by Mr. Sammartino.
- 20 2. Plaintiff’s Motion for Sanctions (ECF No. 45) is **GRANTED**.
- 21 3. Defendants Court Gettel and Conix VRC, LLC’s Answers to the  
22 Complaint (ECF Nos. 16, 18) **ARE STRICKEN**.
- 23 4. The Clerk of the Court is **DIRECTED TO ENTER DEFAULT**  
24 **AGAINST** Defendants Court Gettel and Conix VRC, LLC.
- 25 5. The Court **ORDERS** Plaintiff to file a motion for default judgment  
26 against all defaulting Defendants in this case **no later than December**  
27 **1, 2017**. Such motion should address the damages Plaintiff seeks as part  
28 of a default judgment. Plaintiff is directed to address how this Court

1 should treat Defendant Nighswander, who is not in default.

2 6. Pursuant to Federal Rule of Civil Procedure 37, Defendants Court Gettel

3 and Conix VRC, LLC and Mr. Sammartino, are **ORDERED TO PAY**

4 **Plaintiff's expenses of \$6,275.00, which is to be paid jointly and**

5 **severally.**

6 7. Mr. Sammartino is **ORDERED** to self-report to the State Bar of

7 California the foregoing monetary sanction.

8  
9 **IT IS SO ORDERED.**

10 **DATED: November 3, 2017**

11   
12 **Hon. Cynthia Bashant**  
13 **United States District Judge**